

PART 15

CONTRACTING BY NEGOTIATION

✎ The Comptroller General’s right of access to contractor records is established by the clauses at 52.214-26 and 52.215-2 — the clause at 52.215-1 is reserved. The clause at 52.215-2 also stresses that this right of access “may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law”. (§4.702, 15.106-1, 25.901, 52.214-26, and 52.215-2, FAC 90-31, Case 94-740)

~~15.106-1 Examination of Records clause.~~

- ~~—(a) This subsection implements 10 U.S.C. 2313(b) and (c) and 41 U.S.C. 254(c).~~
- ~~—(b) When contracting by negotiation, the contracting officer shall insert the clause at 52.215-1, Examination of Records by Comptroller General, in solicitations and contracts, except when—~~
 - ~~—(1) Making small purchases (see Part 13);~~
 - ~~—(2) Contracting for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge; or~~
 - ~~—(3) Making contracts with foreign contractors for which the agency head authorizes omission under Subpart 25.9.~~
- ~~—(c) In connection with administration of the clause in research and development contracts with nonprofit institutions, including subcontracts under these contracts, the Comptroller General does not require original documentation of transportation costs (exclusive of travel).~~

✎ The FAR redefines the term “records” to include not only books and documents but also “accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.” (§4.703, 52.214-26, and 52.215-2; FAC 90-31, Case 94-740)

✎ Contractors only have to incorporate the audit and records clause at 52.215-2 in subcontracts that exceed the simplified acquisition threshold and:

- That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;
- For which cost or pricing data are required; or
- That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

This conforms the audit rights at the subcontract level with those at the prime contract level. (52.215-2; FAC 90-31, Case 94-740)

✎ A new Alternate III to the clause at FAR 52.215-2 waives the Comptroller General’s right to examine the records of foreign contractors. Do not automatically waive that right.

Rather, the FAR requires every reasonable effort to negotiate incorporation of the “basic” clause at FAR 52.215-2 with the Comptroller’s right of access intact — and the FAR maintains essentially the same controls on waivers that formerly applied to decisions about omitting the clause at 52.215-1. (§25.901 and 52.215-2; FAC 90-31, Case 94-740).

15.106-1 Audit and Records—Negotiation clause.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
15.106-2 Audit—Negotiation clause.	(a) This subsection implements 10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133.
(a) This subsection implements 10 U.S.C. 2313(a), 41 U.S.C. 254(b), 40 U.S.C. 2306(f), and OMB Circular No. A-133.	
(b) The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-2, Audit— Negotiation, in solicitations and contracts, unless the acquisition is a small purchase under Part 13.	(b) The contracting officer shall, if contracting by negotiation, insert the clause at 52.215-2, Audit and Records—Negotiation , in solicitations and contracts except those (1) not exceeding the simplified acquisition threshold in Part 13; or (2) for utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge.
In facilities contracts, the contracting officer shall use the clause with its Alternate I. In cost-reimbursement contracts with educational institutions and other nonprofit organizations, the contracting officer shall use the clause with its Alternate II.	(c) In facilities contracts, the contracting officer shall use the clause with its Alternate I. In cost-reimbursement contracts with educational institutions and other nonprofit organizations, the contracting officer shall use the clause with its Alternate II. If the examination of records by the Comptroller General is waived in accordance with 25.901, the contracting officer shall use the clause with its Alternate III.

52.215-2 Audit and Records—Negotiation.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
	(a) As used in this clause, records includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.
(a) <i>Examination of costs.</i> If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of these, the Contractor shall maintain—and the Contracting Officer or representatives of the Contracting Officer shall have the right to examine and audit— books, records, documents, and other evi-	(b) <i>Examination of costs.</i> If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evi-

dence and accounting procedures and practices, regardless of form (e.g., machine-readable media such as disk, tape, etc.) or type (e.g., data bases, applications software, data base management software, utilities, etc.), sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred in performing this contract. This right of examinations shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(b) *Cost or pricing data.* If, pursuant to law, the Contractor has been required to submit cost or pricing data in connection with pricing this contract or any modification to this contract, the Contracting Officer or representatives of the Contracting Officer who are employees of the Government shall have the right to examine and audit all of the Contractor's books, records, documents, and other data, regardless of form (e.g., machine-readable media such as disk, tape, etc.) or type (e.g., data bases, applications software, data base management software, utilities, etc.), including computations and projections, related to proposing, negotiating, pricing, or performing the contract or modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used.

(c) *Reports.* If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or representatives of the Contracting Officer who are employees of the Government shall have the right to examine and audit books, records, other documents, and supporting materials, for the purpose of evaluating (1) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports and

dence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(c) *Cost or pricing data.* If the Contractor has been required to submit cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

- (1) The proposal for the contract, subcontract, or modification;
- (2) The discussions conducted on the proposal(s), including those related to negotiating;
- (3) Pricing of the contract, subcontract, or modification; or
- (4) Performance of the contract, subcontract or modification.

(d) *Comptroller General*—(1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) *Reports.* If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or an authorized representative of the Contracting Officer shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating (1) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.

(2) the data reported.

(d) *Availability.* The Contractor shall make available at its office at all reasonable times the materials described in paragraphs (a) and (b) ~~above~~, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

(2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are ~~disposed of~~.

~~(e) Except as otherwise provided in FAR Subpart 4.7, Contractor Records Retention, the Contractor may transfer computer data in machine-readable form from one reliable computer medium to another. The Contractor's computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original data. The contractor's choice of form or type of materials described in paragraphs (a), (b), and (c) of this clause affects neither the Contractor's obligations nor the Government's rights under this clause.~~

(f) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (f), in all subcontracts under this contract that ~~are over the small purchase limitation in FAR Part 13, altering the clause only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.~~

(f) *Availability.* The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

(2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are **finally resolved**.

(g) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract that **exceed the simplified acquisition threshold in FAR Part 13, and—**

(1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;

(2) For which cost or pricing data are required; or

(3) That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

Alternate I (APR 1984). In facilities contracts, add the following sentence at the end of paragraph (a) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilities under this contract.

Alternate II (FEB 1993). In cost-reimbursement contracts with educational and other nonprofit institutions, add the following paragraph (g) to the basic clause:

(g) The provisions of OMB Circular No. A-133 "Audits of Institutions of Higher Learning and Other Nonprofit Institutions" apply to this contract.

Alternate I (OCT 1995). **As prescribed in 15.106-1(c)**, in facilities contracts, add the following sentence at the end of paragraph (b) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilities under this contract.

Alternate II (OCT 1995). **As prescribed in 15.106-1(c)**, in cost-reimbursement contracts with educational and other non-profit institutions, add the following paragraph (h) to the basic clause:

(h) The provisions of OMB Circular No. A-133, "Audits of Institutions of Higher Learning and Other Nonprofit Institutions," apply to this contract.

Alternate III (OCT 1995). **As prescribed in 15.106-1(c), delete paragraph (d) of the basic clause and redesignate the remaining paragraphs accordingly.**

☞ Contracting officers can solicit bids and proposals electronically and permit contractors to submit bids and proposals electronically. When preparing a solicitation authorizing electronic offers, specify the electronic commerce method(s) that bidders may use. Also consider the impact of electronic data interchange on the time reasonably needed by offerors to prepare and submit offers — electronic commerce should speed up the the process of preparing and submitting offers. (§14.202-1, 14.202-2, 14.202-8, 14.203-1, and 15.402 ; FAC 90-29, 91-104)

15.402 General.

(k) In accordance with Subpart 4.5, contracting officers may authorize use of electronic commerce for submission of offers. If electronic offers are authorized, the solicitation shall specify the electronic commerce method(s) that offerors may use. [FAC 90-29]

☞ You may instruct offerors to package and submit past performance data separate and apart from pricing information and, if needed, technical data. (§15.406-5 Part IV, FAC 90-26).

☞ Contracting officers must state **all significant** evaluation factors and subfactors in requests for proposals. (FAC 90-31, Case 94-701) *See also 15.605(d).*

15.406-5 Part IV—Representations and instructions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(b) <i>Section L, Instructions, conditions, and notices to offerors or quoters.</i> Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or quoters in preparing proposals or quotations. Any alteration pertaining to the solicitation shall be included in this section as part of the provision at 52.252-3, Alterations in Solicitation. Prospective offerors or quoters may be instructed to submit technical proposals in severable parts to meet agency requirements. The severable parts should provide for separation of technical and cost or pricing data. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical, and (4) cost or pricing data.</p> <p>(c) <i>Section M, Evaluation factors for award.</i> Identify all factors, including cost or price, cost or price-related factors, and non-cost or non-price-related factors, and any significant subfactors that will be considered in awarding the contract (see 15.605(e) and (f) and the multiple award provision at 52.215-34) and state the relative importance the Government places on those evaluation factors and subfactors.</p>	<p>(b) <i>Section L, Instructions, conditions, and notices to offerors or quoters.</i> Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or quoters in preparing proposals or quotations. Any alteration pertaining to the solicitation shall be included in this section as part of the provision at 52.252-3, Alterations in Solicitation. Prospective offerors or quoters may be instructed to submit technical proposals in severable parts to meet agency requirements. The severable parts should provide for separation of cost or pricing <u>data, past performance data and, when needed, technical data</u>. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical, (4) <u>past performance</u>, and (5) cost or pricing data. <u>[FAC 90-26]</u></p> <p>(c) <i>Section M, Evaluation factors for award.</i> Identify all significant factors, including cost or price, cost or price-related factors, and non-cost or non-price-related factors, and any significant subfactors that will be considered in awarding the contract (see 15.605(d) and e) and the multiple award provision at 52.215-34) and state the relative importance the Government places on those evaluation factors and subfactors. <u>[FAC 90-31]</u></p>

✎ Whenever firms on a mailing list fail to submit an offer in response to a solicitation, the clauses at 52.214-9 and 52.215-15 require them to notify the contracting officer of their desire to continue receiving solicitations for such requirements. Absent such notice, the FAR allows contracting officers to strike their names from the mailing list. The FAR will now permit offerors to deliver the notice electronically rather than on paper. Moreover, contracting officers will not incorporate the clauses at 52.214-9 or 52.215-15 if they solicit offers through electronic data interchange methods that do not require the keeping of solicitation mailing lists. (§14.201-6, 15.407, 52.214-9 and 52.215-15; FAC 90-29, Case 91-104)

15.407 Solicitation provisions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(d) The contracting officer shall—</p> <p>(1) Insert in RFP's for other than construction</p>	<p>(d) The contracting officer shall—</p> <p>(1) Insert in RFP's for other than construction</p>

the provision at 52.215-13, Preparation of Offers;
 (2) Insert in RFP's the provision at 52.215-14, Explanation to Prospective Offerors;
 (3) Insert in RFP's the provision at 52.215-15, Failure to Submit Offer; and
 * * * * *

the provision at 52.215-13, Preparation of Offers;
 (2) Insert in RFP's the provision at 52.215-14, Explanation to Prospective Offerors;
 (3) Insert in RFP's the provision at 52.215-15, Failure to Submit Offer, **except when using electronic data interchange methods not requiring solicitation mailing lists**; and [FAC 90-29]
 * * * * *

52.215-15 Failure to Submit Offer.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
Recipients of this solicitation not responding with an offer should not return this solicitation, unless it specifies otherwise. Instead, they should advise the issuing office by letter or postcard whether they want to receive future solicitations for similar requirements. If a recipient does not submit an offer and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list.	Recipients of this solicitation not responding with an offer should not return this solicitation, unless it specifies otherwise. Instead, they should advise the issuing office by letter, postcard, or established electronic commerce methods , whether they want to receive future solicitations for similar requirements. If a recipient does not submit an offer and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list.

☞ When award will be on the basis of competitive proposals, determine whether to incorporate the award clause at FAR 52.215-16 with or without Alternate II. Generally reserve the right to award without discussions by using Alternate II. The advantage of Alternate II: Initial proposals are likely to be more realistic. Use the clause without the Alternate when discussions are clearly inevitable (e.g., when the contemplated contract type is cost reimbursable). (FAC 90-31, Case 94-701)

☞ For civilian agencies, FAR 52.215-16, Alternate II, expands the Government's right to award without discussions. Under the previous award clause at 52.215-16, the Government's right to award without discussions had been greatly limited in case law. Basically, the Comptroller General only allowed award without discussions when (1) the RFP provided for award to the lowest priced offer in the competitive range and (2) the contracting officer had no reason to believe that discussions would yield a better price. Now, you can award without discussions even in "greatest value" competitions and trade-off the costs of conducting discussions against the possibility of seeing some slight improvement in BAFO prices vis-à-vis those initially proposed.

For DoD, NASA, and Coast Guard, the new Alternate II replaces the prior Alternate III — with no essential change in language. The language of the former Alternate II is now part of the basic provision. (FAC 90-31, Case 94-701)

15.407 Solicitation provisions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(d) The contracting officer shall— * * * *	(d) The contracting officer shall— * * * *
4) Insert in RFP's the provision at 52.215-16, Contract Award. (i) Civilian agencies, other than the Coast Guard and the National Aeronautics and Space Administration, shall use the basic provision as stated. (ii) If the RFP is for construction, the contracting officer shall use the provision with its Alternate I. (iii) The Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration shall use the basic provision with its Alternate II if the contracting officer intends that proposals will be evaluated with, and award made after, discussions with the offerors. (iv) The Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration shall use the basic provision with its Alternate III if the contracting officer intends that proposals will be evaluated, and award made, without discussions with offerors.	(4) Insert in RFP's the provision at 52.215-16, Contract Award. (i) If the RFP is for construction, the contracting officer shall use the provision with its Alternate I. If awards are to be made without discussions, also use Alternate II. (ii) If the contracting officer intends to evaluate offers and make award without discussions, use the basic provision with its Alternate II.

52.215-16 Contract Award.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * *	* * * *
(c) The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. * * * *	(c) The Government intends to evaluate proposals and award a contract after conducting written or oral discussions with all responsible offerors whose proposals have been determined to be within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. * * * *
	<u>Alternate II</u> (SEPT 1995). As prescribed in 15.407(d)(4)(ii), substitute the following paragraph (c) for paragraph (c) of the basic provision: (c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government re-

serves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

☞ Contracting officers may use electronic data interchange to notify prospective offerors of any change to the closing date for submitting proposals. (§15.410, FAC 90-29, Case 91-104)

15.410 Amendment of solicitations before closing date.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(b) The contracting officer shall determine if the closing date needs to be changed when amending a solicitation. If the time available before closing is insufficient, prospective offerors or quoters shall be notified by telegram or telephone of an extension of the closing date, and the notification shall be confirmed in the written amendment to the solicitation. The contracting officer shall not award a contract unless any amendments made to an RFP have been issued in sufficient time to be considered by prospective offerors.</p>	<p>*****</p> <p>(b) The contracting officer shall determine if the closing date needs to be changed when amending a solicitation. If the time available before closing is insufficient, prospective offerors or quoters shall be notified by electronic data interchange, telegram, or telephone of an extension of the closing date. Telephonic and telegraphic notices shall be confirmed in the written amendment to the solicitation. The contracting officer shall not award a contract unless any amendments made to an RFP have been issued in sufficient time to be considered by prospective offerors.</p>

☞ If an offeror withdraws an electronically transmitted proposal, purge the proposal and all related data from all data storage systems — both primary and backup. . (§15.412; FAC 90-29, Case 91-104)

15.412 Late proposals, modifications, and withdrawals of proposals.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(d) When a late proposal or modification is received and it is clear from available information that it cannot be considered for award, the contracting officer shall promptly notify the offeror that it was received late and will not be considered. The notice need not be given when the proposed contract is to be awarded within a few days and the notice prescribed in 15.1001(c)(1) would suffice.</p>	<p>*****</p> <p>(d) When a late proposal or modification is received and it is clear from available information that it cannot be considered for award, the contracting officer shall promptly notify the offeror that it was received late and will not be considered. The notice need not be given when the proposed contract is to be awarded within a few days and the notice prescribed in 15.1002(c)(1) would suffice. [FAC 90-31]</p> <p>*****</p> <p>(h) Upon withdrawal of an electronically transmitted proposal, the data re-</p>

ceived shall not be viewed and shall be purged from primary and backup data storage systems.

☞ Cognizant technical officials are responsible both for technical and past performance requirements related to the source selection process. (FAC 90-26)

15.604 Responsibilities.

(a) Agency heads or their designees are responsible for source selection.

(b) The cognizant technical official is responsible for the technical requirements related to the source selection process.

(c) The contracting officer is responsible for contractual actions related to the source selection process, including—

(1) Issuing solicitations to which this subpart applies in accordance with Subpart 15.4 and this subpart;

(2) Conducting or coordinating cost or price analyses as prescribed in Subpart 15.8;

(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, and other terms and conditions; and

(4) Selecting the source for contract award, unless another official is designated as the source selection authority.

(a) Agency heads or their designees are responsible for source selection.

(b) The cognizant technical official is responsible for the technical **and past performance requirements** related to the source selection process. [FAC 90-26]

(c) The contracting officer is responsible for contractual actions related to the source selection process, including—

(1) Issuing solicitations to which this subpart applies in accordance with Subpart 15.4 and this subpart;

(2) Conducting or coordinating cost or price analyses as prescribed in Subpart 15.8;

(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, **past performance**, and other terms and conditions; and [90-26]

(4) Selecting the source for contract award, unless another official is designated as the source selection authority.

Past Performance and Quality

☞ Contracting officers must evaluate “past performance” in every competitive negotiation if the estimated value of the requirement exceeds:

- \$1,000,000 for solicitations issued on or after July 1, 1995.
- \$500,000 for solicitations issued on or after July 1, 1997
- \$100,000 for solicitations issued on or after January 1, 1999.

Exception: You do not have to evaluate past performance if the contracting officer documents the rationale for disregarding past performance in the contract file. [§15.605, FAC 90-26]

☞ Contracting officers must also consider quality in **every** source selection, through inclusion in one or more non-price factors (e.g., past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance). [§15.605, FAC 90-26]

Environmental Objectives

☞ Contracting officers must consider “environmental objectives” in every source selection “where appropriate”. Possible objectives: “promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content” [§15.605, FAC 90-27]

Award On Low Price or Cost

☞ The FAR reaffirms that contracting officers may continue to award contracts, where appropriate, on the basis of lowest [evaluated] price or cost to responsible offerors whose offers meet the solicitation’s minimum criteria for acceptable award. Remember to state this basis of award in the solicitation. (§15.605, FAC 90-31, Case 94-701)

In this context, you generally may not use responsibility-related factors (e.g., past performance) other than for responsibility determinations, and such determinations are subject to “Certificate of Competency” review by the Small Business Administration.

Greatest Value Competitions

☞ Numerical weights are NOT mandated (or encouraged) by the FAR. The FAR reaffirms that numerical weights can be used — and do not necessarily have to be disclosed in the RFP. Contracting officers may disclose numerical weights “on a case by case basis” in the solicitation. Although the new FAR language does not discourage this practice, disclosing weights generally is NOT good practice. The Comptroller General has repeatedly ruled that Source Selection Authorities have discretion to overrule numerical scores when weights are NOT disclosed in the solicitation. (§15.605, FAC 90-31, Case 94-701)

Incorporating Evaluation Factors in RFPs

☞ Contracting officers no longer have to state **all** evaluation factors in requests for proposals — only the **significant** factors. (FAC 90-31, Case 94-701) *See also §15.406-5.*

☞ RFPs must directly, expressly state whether:

Non-Price evaluation factors (taken as a whole) are ...



- Significantly more important than, **or**
- Approximately equal in importance to, **or**
- Significantly less important than ...



Cost or price.

Insert this language as the prelude in Section M (when using the UCF). (FAC 90-31, Case 94-701)

15.605 Evaluation factors and subfactors.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) The factors that will be considered in evaluating proposals should be tailored to each acquisition and include only those factors that will have an impact on the source selection decision.	(a) The factors and subfactors that will be considered in evaluating proposals shall be tailored to each acquisition and shall include only those factors that will have an impact on the source selection decision. [FAC 90-31]
(b) The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition of officials . However, price or cost to the Government shall be included as an evaluation factor in every source selection.	(b) The evaluation factors and subfactors that apply to an acquisition and the relative importance of those factors and subfactors are within the broad discretion of agency acquisition <u>of officials except that— [FAC 90-26]</u> [FAC 90-31] <div style="margin-left: 20px;">(i) <u>Price or cost to the Government shall be included as an evaluation factor in every source selection. [FAC 90-26]</u></div> <div style="margin-left: 20px;">(ii) <u>Past performance shall be evaluated in all competitively negotiated acquisitions expected to exceed \$100,000 not later than January 1, 1999, unless the contracting officer documents in the contract file the reasons why past performance should not be evaluated. Agencies may develop their own phase-in schedule for past performance evaluations which meets or exceeds the following milestones: All solicitations with an estimated value in excess of (A) \$1,000,000 issued on or after July 1, 1995; (B) \$500,000 issued on or after July 1, 1997; and (C) \$100,000 issued on or after January 1, 1999. Past performance may be evaluated in competitively negotiated acquisitions estimated at \$100,000 or less at the discretion of the contracting offi-</u></div>

cer. [FAC 90-26]

Quality ~~also~~ shall be addressed in every source selection. ~~In evaluation factors, quality may be expressed in terms of~~ technical excellence, management capability, personnel qualifications, prior experience, ~~past performance~~, and schedule compliance.

(iii) Quality shall be addressed in every source selection **through inclusion in one or more of the non-cost** evaluation factors **or subfactors, such as past performance**, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance. [FAC 90-26 and 31]

(iv) **Environmental objectives, such as promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content (see Part 23), shall also be considered in every source selection, when appropriate.** [FAC 90-27]

Any other relevant factors, such as cost realism, may also be included.

(2) Any other relevant factors **or subfactors**, such as cost realism, may also be included. [FAC 90-26 and 31]

~~(c) While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.~~

(d) In awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria.

~~(c)~~ In awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria.

(e) The solicitation shall clearly state the evaluation factors, including cost or price, cost or price-related factors, and non-cost or non-price-related fac-

~~(e)~~**(1) The solicitation should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government in**

tors, and any significant subfactors, that will be considered in making the source selection and their relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

terms of performance, risk management, cost or price, and other factors. At a minimum, the solicitation shall clearly state the **significant** evaluation factors, **such as** cost or price, cost or price-related factors, past performance and other non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection, and their relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors. **Further, the solicitation shall state whether all evaluation factors other than cost or price, when combined, are**

(i) Significantly more important than cost or price,

(i i) Approximately equal to cost or price, or

(i i i) Significantly less important than cost or price.

(2) The solicitation may elaborate on the relative importance of factors and subfactors at the discretion of the contracting officer. Agencies may elect to assign numerical weights to evaluation factors and employ those weights when evaluating proposals. Numerical weights need not be disclosed in solicitations; **however, nothing precludes an agency from disclosing the weights on a case-by-case basis.** The solicitation may state that award will be made to the offeror that meets the solicitation's minimum criteria for acceptable **award at the lowest cost or price.**

(f) In addition to other factors, offers will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see 15.407(h)). The contracting officer shall assume for the purpose of making multiple awards that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under a solicitation. Individual awards shall be for the items or combination of items that result in the lowest ag-

(f) In addition to other factors, offers will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see 15.407(h)). The contracting officer shall assume for the purpose of making multiple awards that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under a solicitation. Individual awards shall be for the items or combination of items that result in the lowest ag-

gregate cost to the Government, including the assumed administrative costs.

gregate cost to the Government, including the assumed administrative costs.

☞ If an electronic proposal is “unreadable”, immediately notify the offeror and provide the offeror with an opportunity to submit clear and convincing evidence:

- Of the content of the proposal as originally submitted; and
- That the proposal is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling.

An electronic proposal is unreadable if you cannot determine whether it conforms to the essential requirements of the solicitation. (§15.607; FAC 90-29, Case 91-104)

15.607 Disclosure of mistakes before award.

FAR as of FAC 90-25

* * * * *

FAR as revised

* * * * *

(d) If a proposal received at the Government facility in electronic format is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the contracting officer immediately shall notify the offeror and provide the opportunity for the offeror to submit clear and convincing evidence—

(1) Of the content of the proposal as originally submitted; and

(2) That the unreadable condition of the proposal was caused by Government software or hardware error, malfunction, or other Government mishandling. [FAC 90-29]

☞ When awarding on the basis of lowest evaluated price or cost with consideration limited to offers that satisfy the solicitations’ minimum criteria for acceptable award, generally you may NOT use responsibility-related factors (e.g., past performance) other than for responsibility determinations. Such responsibility determinations are subject to “Certificate of Competency” review by the Small Business Administration. In best value source selections, a comparative assessment of past performance is distinct and different from the responsibility determination under FAR §9.103 and not subject to “Certificate of Competency” reviews. (§15.608, FAC 90-26).

☞ When evaluating past performance information, consider such issues as:

- The number and severity of an offeror's problems,
- Effectiveness of corrective actions taken by the offeror,
- The offeror's overall work record.
- Age and relevance of past performance information.

(§15.608, FAC 90-26)

☞ Generally speaking, agency officials have broad discretion when determining the sources and types of past performance information to evaluate — which should be tailored to the circumstances of the acquisition. (§15.608, FAC 90-26)

☞ When you plan to evaluate past performance, the solicitation shall afford an offeror the opportunity to identify existing or past contracts awarded to the offeror that are similar in nature to the proposed terms and conditions of the solicitation. Contracting officers also may invite the offerors to provide information on problems encountered during performance of existing or past contracts and on the steps being taken by the offerors to correct the problems. (§15.608, FAC 90-26)

☞ Contracting officers may obtain information on the past performance of an offeror from sources other than the offeror. This includes any source (public or private sector) known to the Government. In particular, obtain information from contracting activities anywhere in the Government which have evaluated an offeror's performance as prescribed in FAR Part 42.15. (§15.608, FAC 90-26)

☞ Assign a neutral evaluation for past performance to any offeror which lacks relevant past performance history. (§15.608, FAC 90-26)

15.608 Proposal evaluation.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability (as conveyed by the proposal) to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation.</p> <p>(1) <i>Cost or price evaluation.</i> The contracting officer shall use cost or price analysis (see Subpart 15.8) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract. The contracting officer shall document the cost or price evaluation.</p> <p>(2) <i>Technical evaluation.</i> * * * *</p>	<p>(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation. [FAC 90-26]</p> <p>(1) <i>Cost or price evaluation.</i> The contracting officer shall use cost or price analysis (see Subpart 15.8) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract. The contracting officer shall document the cost or price evaluation.</p> <p>(2) <i>Past Performance evaluation.</i> (i) Past performance information is an indicator of an offeror's ability to perform the contract. The comparative assessment of past performance information is separate from the responsibility determination required under 9.103. The number and se-</p>

verity of an offeror's problems, the effectiveness of corrective actions taken, the offeror's overall work record, and the age and relevance of past performance information should be considered at the time it is used.

(ii) Where past performance is to be evaluated, the solicitation shall afford offerors the opportunity to identify Federal, state and local government, and private contracts performed by the offerors that were similar in nature to the contract being evaluated, so that the Government may verify the offerors' past performance on these contracts. In addition, at the discretion of the contracting officer, the offerors may provide information on problems encountered on the identified contracts and the offerors' corrective actions. Past performance information may also be obtained from other sources known to the Government. The source and type of past performance information to be included in the evaluation is within the broad discretion of agency acquisition officials and should be tailored to the circumstances of each acquisition. Evaluations of contractor performance prepared in accordance with Subpart 42.15 are one source of performance information which may be used.

(iii) Firms lacking relevant past performance history shall receive a neutral evaluation for past performance. [90-26]

(3) *Technical evaluation.* * * * *

☞ If the RFP included FAR 215-16 **absent** Alternate II, establish a competitive range and conduct discussions with all offerors in the competitive range.


If Alternate II was incorporated, determine whether discussions are necessary. If necessary, document the reasons in the contract file. The new FAR language provides no examples of circumstances under which discussions might be necessary. Among the potential reasons for conducting discussions:

- No proposal is technically acceptable.
- Only one proposal is technically acceptable, because other offerors appear to have misinterpreted the RFP's requirements.
- All prices appear to be unreasonably high, compared with prior prices or current market prices for like deliverables.
- The lowest offered price appears to be unrealistic (e.g., the product of a potential cost estimating mistake) when compared with the Government estimate.

- All prices are unrealistically low.
(FAC 90-31, Case 94-701)

15.610 Written or oral discussion.


<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions—</p> <p>(1) In which prices are fixed by law or regulation;</p> <p>(2) Of the set-aside portion of a partial set-aside;</p> <p>(3) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, in which it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in the lowest overall cost to the Government at a fair and reasonable price; provided, that—</p> <p>—(i) The solicitation notified all offerors of the possibility that award might be made without discussion; and</p> <p>—(ii) The award is in fact made without any written or oral discussion with any offeror; or</p> <p>—(4) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, if the contracting officer determines that discussions are not necessary, provided the solicitation contains the provision at 52.215-16 with its Alternate III. Once the Government states its intent to award without discussions, the rationale for reversal of this decision shall be documented in the contract file.</p> <p>(b) Except as provided in paragraph (a) above, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) below).</p>	<p>(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions—</p> <p>(1) In which prices are fixed by law or regulation;</p> <p>(2) Of the set-aside portion of a partial set-aside;</p> <p>(3) In which the solicitation notified all offerors that the Government intends to evaluate proposals and make award without discussion unless the contracting officer determines that discussions (other than communications conducted for the purpose of minor clarification) are considered necessary (see 15.407(d)(4)). Once the Government states its intent to award without discussions, the rationale for reversal of this decision shall be documented in the contract file.</p> <p>(b) Except as provided in paragraph (a) of this section, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) of this section).</p>

 During discussions, provide an offeror the opportunity to discuss past performance information not previously made available to the offeror for review and comment. This does NOT apply to information on past performance collected under FAR 42.15 — unless the contracting activity had failed to provide contractors with opportunities to review and comment on the past performance records as required by that FAR section.

During discussions, DO NOT disclose the names (or other identifiers) of individuals which provided reference information on the offeror's past performance. (§15.610, FAC 90-26)

15.610 Written or oral discussion.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>***</p> <p>(c) The contracting officer shall—</p> <p>(1) Control all discussions;</p> <p>(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;</p> <p>(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;</p> <p>(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24); and</p> <p>(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.</p>	<p>***</p> <p>(c) The contracting officer shall—</p> <p>(1) Control all discussions;</p> <p>(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;</p> <p>(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;</p> <p>(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24);</p> <p>(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions; and</p> <p>(6) Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. Names of individuals providing reference information about an offeror's past performance shall not be disclosed. [FAC 90-26]</p>

 When reviewing proposed indirect costs, ask the cognizant audit office to determine whether any audits completed during the preceding 12 months addressed those costs. Do not request a new audit of the proposed indirect costs if information from the prior audits is adequate for determining the reasonableness of those costs. [§15.805-5, FAC 90-31, Case 94-740]

15.805-5 Field pricing support.


<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a)(1) When cost or pricing data are required, contracting officers shall request a field pricing report (which may include an audit review by the cognizant contract audit activity) before negotiating any contract or modification resulting from a proposal in</p>	<p>(a)(1) When cost or pricing data are required, contracting officers shall request a field pricing report (which may include an audit review by the cognizant contract audit activity) before negotiating any contract or modification resulting from a proposal in</p>


excess of \$500,000, except as otherwise authorized under agency procedures, unless information available to the contracting officer is considered adequate to determine the reasonableness of the proposed cost or price. Requests for field pricing support should be tailored to ask for minimum essential information needed to ensure a fair and reasonable price. Information of the type described in subdivisions (a)(1)(i) through (a)(1)(vi) of this subsection, which is often available to the contracting officer from the Administrative Contracting Officer or from the cognizant auditor, may be useful in determining the extent of any field pricing support that is needed—

* * * *

excess of \$500,000, except as otherwise authorized under agency procedures, unless information available to the contracting officer is considered adequate to determine the reasonableness of the proposed cost or price. **The contracting officer should contact the cognizant audit office to determine the existence of audits addressing proposed indirect costs. In accordance with 41 U.S.C. 254d and 10 U.S.C. 2313, the contracting officer shall not request a preaward audit of such indirect costs unless the information available from any existing audit completed within the preceding 12 months is considered inadequate for determining the reasonableness of the proposed indirect costs.** Requests for field pricing support should be tailored to ask for minimum essential information needed to ensure a fair and reasonable price. Information of the type described in subdivisions (a)(1)(i) through (a)(1)(vi) of this subsection, which is often available to the contracting officer from the Administrative Contracting Officer or from the cognizant auditor, may be useful in determining the extent of any field pricing support that is needed—

* * * *

 Notify unsuccessful offerors within three days after award. (FAC 90-31, Case 94-701)
Consider notification by registered mail, with return receipt requested, or E-Mail with automatic return receipt, or fax if your fax software or hardware verifies receipt by the receiving fax station. For the purpose of this section, “day” means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday. (FAC 90-31, Case 94-701)

 Contracting officers can use electronic rather than paper medium to transmit preaward notices, postaward notices, and notices of award. (FAC 90-31, Case 94-701)

SUBPART 15.10—PREAWARD, AWARD, AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

FAR as of FAC 90-25

FAR as revised

15.1001 General. This subpart applies to the use of competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in

6.102(c). To the extent practicable, however, the procedures and intent of this subpart, with reasonable modification, should be followed for acquisitions described in 6.102(d): broad agency announcements, small business innovation research contracts and architect-engineer contracts. However, they do not apply to multiple award schedules, as described in 6.102(d)(3).

15.1002 Notifications to unsuccessful offerors.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) <i>General.</i> The contracting officer shall promptly notify each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award, unless disclosure might prejudice the Government's interest.</p>	<p>(a) <i>General.</i> <u>Within three days after the date of contract award</u>, the contracting officer shall notify, <u>in writing or electronically</u>, each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award. <u>"Day", for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.</u></p>
<p>(b) <i>Preaward notices.</i> (1) When the proposal evaluation period for a solicitation not using simplified acquisition procedures in Part 13 is expected to exceed 30 days, or when a limited number of offerors have been selected as being within the competitive range (see 15.609), the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror. The notice shall at least state (i) in general terms the basis for the determination and (ii) that a revision of the proposal will not be considered. [FAC 90- 29]</p> <p>(2) In a small business set-aside (see Subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror. The notice shall also state that (i) the Government will not consider subsequent revisions of the unsuccessful proposal and (ii) no response is required unless a basis exists to challenge the small business size status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.</p>	<p>(b) <i>Preaward notices.</i> (1) When the proposal evaluation period for a solicitation estimated to exceed the small purchase limitation in part 13 is expected to exceed 30 days, or when a limited number of offerors have been selected as being within the competitive range (see 15.609), the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror. The notice shall at least state (i) in general terms the basis for the determination and (ii) that a revision of the proposal will not be considered.</p> <p>(2) In a small business set-aside (see Subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each unsuccessful offeror in writing or electronically of the name and location of the apparent successful offeror. The notice shall also state that (i) the Government will not consider subsequent revisions of the unsuccessful proposal and (ii) no response is required unless a basis exists to challenge the small business size status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.</p>
<p>(c) <i>Postaward notices.</i> (1) After award of contracts resulting from solicitations not using</p>	<p>(c) <i>Postaward notices.</i> (1) Promptly after award of contracts resulting from solicitations exceeding</p>

simplified acquisition procedures, the contracting officer shall notify unsuccessful offerors in **writing or electronically**, unless preaward notice was given under paragraph (b) of this section. The notice shall include—

- (i) The number of offerors solicited;
 - (ii) The number of proposals received;
 - (iii) The name and address of each offeror receiving an award;
 - (iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and
 - (v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in (iv) above readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.
- (2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), the information in paragraph (c)(1) of this section shall be provided to unsuccessful offerors from designated or NAFTA countries promptly, but in no event later than seven working days after contract award.
- (3) Upon request, the contracting officer shall furnish the information described in 15.1001(c)(1) (i) through (v) to unsuccessful offerors in solicitations **using simplified acquisition procedures** in Part 13.

~~the small purchase limitation in Part 13~~, the contracting officer shall notify unsuccessful offerors in ~~writing~~, unless preaward notice was given under paragraph (b) of this section. The notice shall include—

- (i) The number of offerors solicited
 - (ii) The number of proposals received;
 - (iii) The name and address of each offeror receiving an award;
 - (iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and
 - (v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in (iv) above readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.
- (2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), the information in paragraph (c)(1) of this section shall be provided to unsuccessful offerors from designated or NAFTA countries promptly, but in no event later than seven working days after contract award.
- (3) Upon request, the contracting officer shall furnish the information described in 15.1001(c)(1)(i) through (v) to unsuccessful offerors in solicitations ~~not exceeding the small purchase limitation in Part 13~~.

15.1003 Notification to successful offerors.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written of the award to that offeror (but see 15.608(b)). * * * * *	The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written or electronic notice of the award to that offeror (but see 15.608(b)). * * * * *

Requests for Debriefings

☞ Offerors (including awardees — not just the unsuccessful) may request debriefings whenever award is on the basis of competitive proposals, whether or not the contracting officer conducted discussions and whether or not award was on price and price related factors alone. (§15.1004, FAC 90-31, Case 94-701)

Conducting Debriefings

☞ Debriefings can be by electronic or any other method acceptable to the contracting officer. (§15.1004, FAC 90-31, Case 94-701)

☞ Reaffirms that COs are responsible for chairing debriefings (unless the CO is unavailable, in which case the contracting officer may designate some other agency representative to serve as the chair with approval of an individual a level above the CO). Also reaffirms that “individuals actually responsible for the evaluations shall provide support”. (§15.1004, FAC 90-31, Case 94-701)

Debriefing Do's and Don'ts

☞ Previously, the FAR required only that the Government share its evaluation of the significant weaknesses or deficiencies in the offeror's proposal. In addition, the Government team must at minimum now provide information on:

- The overall evaluated cost and technical rating of the successful offeror and the debriefed offeror, if applicable (obviously this would not apply to debriefings of awardees).*
- The overall ranking of all offerors when any ranking was developed by the agency during the source selection.*
- A summary of the rationale for award.*
- For commercial end items delivered under the contract, the make and model of the awardee's deliverable.*
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(* do not apply to A&E contracts)

☞ However, you still may NOT provide point by point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, you still may NOT reveal any information exempt from release under the Freedom of Information Act, including—

- Trade secrets.
- Privileged or confidential manufacturing processes and techniques.
- Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information. (§15.1004, FAC 90-31, Case 94-701)

☞ The Freedom of Information Act also protects the names of individuals providing reference information about an offeror's past performance. (§15.1004, FAC 90-26)

Summarizing the Debriefing for the Record

☞ You must prepare an “official” summary of the debriefing for the contract file. The FAR doesn’t detail the contents of this summary. It could take the form of a memorandum for the record. Include a copy of the script, if you have such. Also include a list of questions and how they were answered. (§15.1004, FAC 90-31, Case 94-701)

Availability of Information from Debriefings to Prospective Offerors

☞ If, within one year of the protested contract award, you issue a new solicitation or request for BAFOs, make the following information available to all prospective offerors:

- Information on the successful offeror’s proposal provided in any debriefings on the original award.
- Other nonproprietary information that would have been provided to the original offerors.

(§15.1004, FAC 90-31, Case 94-701)

15.1004 Debriefing of unsuccessful offerors

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) When a contract is awarded on the basis of other than price alone (see Subpart 15.6) , unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.	(a) When a contract is awarded on the basis of competitive proposals , an offeror, upon its written request received by the agency within three days after the date the unsuccessful offeror receives notice of contract award , shall be debriefed and furnished the basis for the selection decision and contract award. When practicable, debriefing requests received more than three days after the offeror receives notice of contract award shall be accommodated. <u>However, accommodating such untimely debriefing requests does not extend the time within which suspension of performance can be required, as this accommodation is not a "required debriefing" as described in FAR Part 33.</u> To the maximum extent practicable, the debriefing should occur within five days after receipt of the written request. <u>"Day", for purposes of the debriefing process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.</u>
	(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, by electronic means, or any other method acceptable to the contracting officer.
	(c) The contracting officer should chair any debriefing session held. Individuals actually responsible for the

evaluations shall provide support. If the contracting officer is unavailable, another agency representative may be designated by the contracting officer on a case-by-case basis, with the approval of an individual a level above the contracting officer.

(b) Debriefing information shall include the Government's evaluation of the significant weak or deficient factors in the proposal; ~~however, point-by-point comparisons with other offerors' proposals shall not be made. Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring.~~ Moreover, debriefing shall not reveal any information that is not releasable under the Freedom of Information Act; for example—

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques; and
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(c) The contracting officer shall include a summary of the debriefing in the contract file.

(d) **At a minimum**, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, **if applicable**;

(2) **The overall evaluated cost or price and technical rating, if applicable, of the successful offeror and debriefed offeror;**

(3) **The overall ranking of all offerors when any ranking was developed by the agency during the source selection;**

(4) **A summary of the rationale for award;**

(5) **For acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror; and**

(6) **Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.**

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, debriefing shall not reveal any information exempt from release under the Freedom of Information Act including—

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques;
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) **The names of individuals providing reference information about an offeror's past performance.** [FAC 90-26]

(f) The contracting officer shall include **an official** summary of the debriefing in the contract file.

(g) **If, within one year of contract award, a protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested contract award, the agency shall**

make available to all offerors—

(1) Information provided in any debriefings conducted on the original award about the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.


52.215-16 Contract Award.

FAR as of FAC 90-25


FAR as revised

* * * *

(h) The Government may disclose the following information in post-award debriefings to other offerors: (1) the overall evaluated cost and technical rating of the successful offeror; (2) the overall ranking of all offerors, when any ranking was developed by the agency during source selection; (3) a summary of the rationale for award; and (4) for acquisitions of commercial end items, the make and model or commercial item description of the item to be delivered by the successful offeror.

 Reject electronic proposals unless the offeror used an electronic commerce method specifically stipulated or permitted by the solicitation. (§52.215-9; FAC 90-29, 91-104)

52.215-9 Submission of Offers. * * * * * (d) Offers submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.

 If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” bids or proposals. (§14.304-1, 52.214-7, 52.214-23, 52.214-32, 52.214-33, 52.215-10, and 52.215-36; FAC 90-29, 91-104)

52.215-10 Late Submissions, Modifications, and Withdrawals of Proposals.

FAR as of FAC 90-25

FAR as revised

(a) Any proposal received at the office designated in the solicitation after the exact time specified for

(a) Any proposal received at the office designated in the solicitation after the exact time specified for

receipt will not be considered unless it is received before award is made and it—

receipt will not be considered unless it is received before award is made and it—

* * * *

(4) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

* * * * *

52.215-36 Late Submissions, Modifications, and Withdrawals of Proposals (Overseas).

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—</p> <p>(1) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or</p> <p>(2) Is the only proposal received.</p>	<p>(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—</p> <p>(1) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government the late receipt was due solely to mishandling by the Government after receipt at the Government installation;</p> <p>(2) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or [FAC 90-29]</p> <p>(3) Is the only proposal received.</p>